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In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES DEPARTMENT OF JUSTICE,
PETITIONER

v.

EVELYN FALKOWSKI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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REPLY MEMORANDUM FOR PETITIONER

Respondent has not provided any reason why certiorari should not be granted in this case.

1. Respondent notes (Br. in Opp. 13) that she was sued by Perry in her official as well as her individual capacity. She appears to suggest (Br. in Opp. 13) that whether or not government attorneys were provided to represent her in her individual capacity, the government was obligated to represent her in her official capacity.

This argument is a red herring. Perry's complaint named Eleanor Holmes Norton, then chairman of the Equal Employment Opportunity Commission, as a defendant in her official capacity (App., *infra,* 1a). The complaint also named respondent as a defendant in both her official and individual capacities (*ibid.*). The complaint sought a

declaratory judgment that the recording of Perry's conversation with respondent and his attempted discharge violated his statutory and constitutional rights (*id.* at 3a). It also sought actual and punitive damages (*ibid.*).

The government never refused to represent respondent in her official capacity. Since a suit against a government official in his or her official capacity is in effect an attempt to obtain relief from the government itself, the government always provides representation in such cases. In the present case, the United States Attorney and attorneys for the EEOC entered an appearance for Norton and successfully defended against Perry's suit insofar as it sought relief from the Commission. Thus, government attorneys effectively represented respondent's interests insofar as she was sued in her official capacity.

The Justice Department advised that respondent should submit a request if she wanted representation in her individual capacity (see 28 C.F.R. 50.15(a)(1)), and by letter to the EEOC general counsel, respondent sought such representation. See C.A. App. 102. This request was subsequently denied by the Department "pursuant to 28 C.F.R. § 50.15(a)(2)" (Pet. App. 30a), a provision that applies exclusively to the representation of a federal official or employee who is "sued, subpoenaed, or charged in his individual capacity" (see 20 C.F.R. 50.15(a)). It was this denial of representation that the court of appeals reviewed.

2. Contrary to respondent's contention (Br. in Opp. 15-16), the government has not argued that a refusal to provide representation on the basis of race or gender would be exempt from judicial review. As noted in the petition (at 10 n.6), the sole issue in this case is whether representation decisions are reviewable under the Administrative Procedure Act (APA), which permits agency action to be set aside if it is "arbitrary, capricious, [or] an abuse of discretion" (5

U.S.C. 706(2)(A)). Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.* — which is the "exclusive and pre-emptive" remedy for claims of discrimination against federal employees (*Brown* v. *General Services Administration,* 425 U.S. 820, 829 (1976)) — an employee may sue his or her employer to contest the denial of representation on grounds of discrimination. Respondent herself included such a claim in her complaint in this case (see Pet. App. 19a-21a).

3. The question whether the government's representation decisions are reviewable under the APA is similar to one of the questions now before the Court in *Heckler* v. *Chaney,* No. 83-1878. As explained in the petition in the present case (at 9 & n.5), we believe that consideration of this case together with *Chaney* may be helpful to the Court. Accordingly, if certiorari is granted in this case, we would be prepared to file our brief on an expedited basis so that the two cases could be argued and considered together.

For these reasons and the reasons set forth in the petition, it is respectfully submitted that the petition should be granted.

REX E. LEE
Solicitor General

SEPTEMBER 1984

DOJ-1985-09

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BERTRAM N. PERRY, PLAINTIFF,	]	
VS.	]	
EVELYN FALKOWSKI, individually and as Executive Director, Birmingham District Office, U.S. Equal Employment Opportunity Commission; ELEANOR HOLMES NORTON, as Chairman, U.S. Equal Employment Opportunity Community; and X Y and Z whose names are unknown at present but will be named by amendment when ascertained.	]	Civil Action No. 78-PT-935S
DEFENDANTS.	]	

[Filed: Aug. 24, 1978]

COMPLAINT

Jurisdiction of this Court is invoked pursuant to 28 USC 1343 18 USC 2520. This is a civil action pursuant to 18 USC 2520 seeking actual and punitive damages for the unlawful acts of Defendants. Jurisdiction is also invoked to redress the deprivation of rights of Plaintiff protected by First, Fifth and Fourteenth Amendments to the Constitution of the United States, 42 USC §§ 1981, 1985 and 1986. This suit further seeks Declaratory and Injunctive relief pursuant to 28 USC §§ 2201, 2202 and 42 USC § 2000-e et seq.

1. Plaintiff is a Negro resident citizen of Birmingham, Alabama and resides at 228 - 10th Avenue, S.W.

2. Plaintiff is an employee of the U. S. Equal Employment Opportunity Commission and serves as Deputy Director of the Birmingham District Office, of said commission.

3. Plaintiff avers that on or about November 7, 1977, the United States Equal Employment Opportunity Commission, hereinafter referred to as EEOC, filed a petition before the Hon. J. Foy Guin in case number 75-G-1476 Perry v. Golub, United States District Court for the Northern District of Alabama, Southern Division.

4. Plaintiff avers that said Petition was filed seeking approval to process adverse action against the Plaintiff herein, to discharge Plaintiff from federal service after twelve (12) years of loyal and competent service.

5. Plaintiff avers that as a basis of said proposed adverse action, Defendant, EEOC by and through its agents, acting within the full scope and authority of their official capacity did willfully and maliciously disclose the contents of a taped conversation between Plaintiff, Bertram N. Perry and Defendant, Evelyn Falkowski.

6. Plaintiff avers that on or about July 18, 1977, Defendant, Evelyn Falkowski, while acting within the full scope of authority of her official capacity provoked the Plaintiff for the express purpose of obtaining statements from him, and further that said Defendant, without the knowledge or consent of Plaintiff, did cause said statements to be recorded by a hidden recording device for the purpose of causing injury to Plaintiff with respect to Plaintiff's employment, in violation of 18 USC §§ 2511-2520, EEOC Order 165 and Plaintiff's First Amendment Rights under the United States Constitution.

7. Plaintiff avers that Defendant, Eleanor Holmes Norton, as Chairman of the EEOC, did effectuate discharge proceedings against the Plaintiff, as a result of the disclosure of said tape recording, with full knowledge of the unlawfulness of the use of same, with the intent to cause injury to Plaintiff's employment status in violation of 18 USC §§ 2511-2520 and in violation of the Plaintiff's First Amendment rights under the United States Constitution.

8. Plaintiff further avers that the unlawful acts of Defendants complained of herein were commited against Plaintiff because of his race, in violation of 42 USC § 2000-e et seq.

WHEREFORE PREMISES CONSIDERED, Plaintiff respectfully prays this Court to advance this cause on the docket, order a speedy hearing at the earliest practical date, cause this case to be in every way expedited and upon such hearing to:

1. Grant Plaintiff a Declaratory Judgment that the actions of Defendants complained of herein violate the rights of Plaintiff guaranteed by 18 USC 2511-2520, 42 USC §§ 1981, 1985, 1986, 2000-e et seq., the First, Fifth and Fourteenth Amendments to the United States Constitution.

2. Grant Plaintiff an award of $200,000.00 in actual damages.

3. Grant Plaintiff an award of FIVE MILLION ($5,000,000.00) DOLLARS as punitive damages against the Defendants for the wrongful and unlawful acts heretofore complained of.

4. Allow Plaintiff his costs herein including a reasonable attorneys fee as provided by 42 USC § 2000-e 5(k), and 18 USC § 2250.

5. Grant Plaintiff such other additional relief as may appear to the Court to be equitable and just.

Respectfully Submitted

_____

BERTRAM N. PERRY

Plaintiff demands trial by struck jury on all such issues.

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